Supreme Court, U.S.
FILED
AUG 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2011

In the Supreme Court of the United States

OCTOBER TERM, 1989

NATHAN WECHSLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
THOMAS E. BOOTH
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether petitioner is entitled to a writ of error coram nobis vacating his Travel Act conviction on the ground that the evidence did not show a sufficient nexus between his conduct and interstate commerce.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	3
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Johnson v. *Zerbst*, 304 U.S. 458 (1938)	4
Rewis v. *United States*, 401 U.S. 808 (1971)	3, 5
United States v. *Altobella*, 442 F.2d 310 (7th Cir. 1971)	7
United States v. *Archer*, 486 F.2d 670 (2d Cir. 1973)	6
United States v. *Bagnariol*, 665 F.2d 877 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982)	6
United States v. *Barbieri*, 614 F.2d 715 (10th Cir. 1980)	6
United States v. *Bursten*, 560 F.2d 779 (7th 1977)	6
United States v. *Hathaway*, 534 F.2d 386 (1st Cir.), cert. denied, 429 U.S. 819 (1976)	6, 7
United States v. *Isaacs*, 493 F.2d 1124 (7th Cir.), cert. denied, 417 U.S. 976 (1974)	7
United States v. *Keane*, 852 F.2d 199 (7th Cir. 1988), cert. denied, 109 S. Ct. 2109 (1989)	4
United States v. *LaFaivre*, 507 F.2d 1288 (4th Cir. 1974), cert. denied, 420 U.S. 1004 (1975)	6
United States v. *Mandel*, 862 F.2d 1067 (4th Cir. 1988), cert. denied, 109 S. Ct. 3190 (1989)	5
United States v. *Mayer*, 235 U.S. 55 (1914)	4
United States v. *Morgan*, 346 U.S. 502 (1954)	3, 4
United States v. *Muskovsky*, 863 F.2d 1319 (7th Cir. Cir. 1988)	6
United States v. *O'Dell*, 671 F.2d 191 (6th Cir. 1982)	5, 6
United States v. *Pecora*, 693 F.2d 421 (5th Cir. 1982), cert. denied, 462 U.S. 1119 (1983)	6
United States v. *Peskin*, 527 F.2d 71 (7th Cir. 1975), cert. denied, 429 U.S. 818 (1976)	6, 7

Cases—Continued: Page

United States v. *Ranieri*, 670 F.2d 702 (7th Cir. 1982), cert. denied, 459 U.S. 1035 (1982) 6
United States v. *Rauhoff*, 525 F.2d 1170 (7th Cir. 1975) .. 6
United States v. *Smith*, 789 F.2d 196 (3d Cir.), cert. denied, 479 U.S. 1017 (1986) 6
United States v. *Travers*, 514 F.2d 1171 (2d Cir. 1974) ... 5

Statutes:

All Writs Act, 28 U.S.C. 1651 4
Travel Act, 18 U.S.C. 1952 .....2, 3, 5, 6, 7
18 U.S.C. 1952(a) 2
18 U.S.C. 1952(b) (1982 & Supp. V 1987) 2
28 U.S.C. 2254 4
28 U.S.C. 2255 ..... 3, 4

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-2011

NATHAN WECHSLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 873 F.2d 1441.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1989. The petition for a writ of certiorari was filed on June 12, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1967, petitioner was convicted of conspiracy to violate the Travel Act, in violation of 18 U.S.C. 1952. The court of appeals affirmed his conviction. 392 F.2d 344, cert. denied, 392 U.S. 932 (1968). In 1988, petitioner sought

a writ of error coram nobis in the United States District Court for the Eastern District of Virginia, requesting vacation of his conviction. The district court denied the application. The court of appeals affirmed. Pet. App. 1a-3a.

The evidence at trial showed that in March 1961 petitioner and his business partners bribed three members of the Fairfax County Board of Supervisors to obtain approval of a rezoning application for a tract of land in Fairfax County, Virginia. As part of the scheme, petitioner deposited $5,500 in bribe money into the Washington, D.C., bank account of an attorney who served as an intermediary. After the Board voted to approve petitioner's rezoning application, the attorney wrote a $5,500 check from the account to Supervisor Leigh, which Leigh deposited into his Virginia bank account. Leigh then shared the bribe money with Supervisors DeBell and Cotton. Cotton deposited into his District of Columbia bank a check for $1,000 drawn on Leigh's Virginia bank. The Virginia state courts subsequently set aside the Board's action on the rezoning application, but petitioner filed a second rezoning application, which was approved by the Board. The Board members who had been bribed voted in favor of the second application. Pet. App. 2a-3a.

The Travel Act, 18 U.S.C. 1952(a), prohibits "travel[] in interstate or foreign commerce or use[] [of] any facility in interstate or foreign commerce, including the mail, with intent to * * * distribute the proceeds of any unlawful activity; or * * * facilitate * * * any unlawful activity." The "unlawful activit[ies]" covered by the Act include "bribery." 18 U.S.C. 1952(b) (1982 & Supp. V 1987). At petitioner's trial, jurisdiction under the Travel Act was premised on the $1,000 check that was drawn on Leigh's Virginia bank and deposited into Cotton's bank in the District of Columbia. The court of appeals upheld peti-

tioner's conviction, holding that the transmittal of the bribery proceeds in interstate commerce was sufficient to establish jurisdiction. 392 F.2d at 347 n.3.

In 1988, after he had long since completed service of his sentence (and hence was ineligible for relief under 28 U.S.C. 2255), petitioner filed a petition for a writ of error coram nobis in the United States District Court for the Eastern District of Virginia, contending, among other things, that the passage of the check through interstate commerce was not sufficient to confer jurisdiction under the Travel Act. The district court declined to issue a writ of error coram nobis. Pet. App. 4a-5a.

The court of appeals affirmed. The court first noted that the argument that petitioner's conviction cannot be premised on the movement in interstate commerce of the check containing Cotton's bribe "was rejected by this court on [petitioner's] direct appeal." Pet. App. 2a. The court then rejected petitioner's argument that a different result is required by this Court's decision in *Rewis* v. *United States*, 401 U.S. 808 (1971), which held that the fact that some out-of-staters frequented a gambling establishment did not establish jurisdiction under the Travel Act. The court of appeals stated that neither the Travel Act nor *Rewis* requires "that there be a substantial and integral involvement of interstate facilities with the illegal activity." Pet. App. 3a.

ARGUMENT

As an initial matter, review is inappropriate because petitioner does not qualify for coram nobis relief. Petitioner is seeking to relitigate an issue he raised unsuccessfully on the direct appeal from his conviction. In *United States* v. *Morgan*, 346 U.S. 502, 506 (1954), this Court

emphasized that not all errors, but only those " 'of the most fundamental character,' " warrant coram nobis relief. 346 U.S. at 512 (quoting *United States* v. *Mayer*, 235 U.S. 55, 69 (1914)). It stressed that the "[c]ontinuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice." 346 U.S. at 511.[1] In accord with that standard, the Seventh Circuit in *United States* v. *Keane*, 852 F.2d 199 (1988), cert. denied, 109 S.Ct. 2109 (1989), held that coram nobis is not available to relitigate issues that were fully ventilated at the time of conviction. The court observed that at common law coram nobis review was limited to claims that were not apparent on the face of the record and therefore not raised at trial. Since coram nobis is not expressly authorized by any federal statute, but is instead available under the All Writs Act, 28 U.S.C. 1651, the court concluded that the common law rule ought to apply. Moreover, the court noted, coram nobis litigants, by definition, are not in custody, since coram nobis is available only when there is no other available remedy and persons in custody may seek relief under 28 U.S.C. 2254 and 2255. "The reason to bend the usual rules of finality is missing when liberty is not at stake," the court concluded. 852 F.2d at 203. It added that courts should focus their attention on the claims of persons who are in custody or have not yet had their claims reviewed. *Ibid.*

---

[1] While he was a minor, the defendant in *Morgan* had pleaded guilty to a federal charge without waiving his right to counsel, which was an error under *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). The Court allowed him to reopen his federal conviction pursuant to a writ of error coram nobis after he was given a longer term as a second offender upon being convicted of a state offense.

Some courts have held that coram nobis is available to relitigate a claim where there has been an intervening change in the law that negates the presence of a crime. See *United States* v. *Mandel*, 862 F.2d 1067 (4th Cir. 1988), cert. denied, 109 S. Ct. 3190 (1989); *United States* v. *Travers*, 514 F.2d 1171 (2d Cir. 1974). But coram nobis relief is not available here under that rationale. Petitioner is incorrect in contending (Pet. 10-13) that, under *Rewis* v. *United States*, 401 U.S. 808 (1971), which was decided after his conviction had become final, his conduct is not prohibited by the Travel Act. Nothing in the language of the Travel Act prohibits the operation of an unlawful business that attracts some out-of-state customers, as in *Rewis*. However, the Act explicitly prohibits the use of interstate facilities to "distribute the proceeds of any unlawful activity" or to "facilitate * * * any unlawful activity," which is precisely what happened when petitioner's bribe to Supervisor Cotton was deposited in an out-of-state bank.[2]

Even if coram nobis relief were otherwise available, this case would not present an opportunity to resolve the conflict in the courts of appeals concerning the standard to be applied, in light of *Rewis*, in determining whether there is jurisdiction under the Travel Act. Most of the circuits have stated that the nexus between the interstate facility

---

[2] Petitioner's reliance (Pet. 15-16) on *United States* v. *O'Dell*, 671 F.2d 191 (6th Cir. 1982), is misplaced. There, the court of appeals found no Travel Act violation where the operator of an illegal prostitution ring advertised his massage parlor business (which apparently fronted for the prostitution ring) in the local newspapers, some of which were sent outside the State. In reversing the defendant's conviction, the court emphasized that the defendant did not specifically urge the newspapers to carry his advertisements in its out-of-state editions, so the case was similar to *Rewis*, and the fact that the business attracted out-of-state customers could be said to be fortuitous.

and the illegal activity must be more than incidental, indirect, or minimal.[3] The Fourth and Fifth Circuits, on the other hand, have stated that an incidental connection between an interstate facility and an illegal activity suffices to bring that activity within the Travel Act.[4] But despite the dispute over the nature of the test to be applied, the courts of appeals all agree that the Travel Act has been violated where, as here, a participant in a bribery scheme uses interstate banking facilities to transmit payment in the form of a check to a bribed official. In *United States* v. *Peskin*, 527 F.2d 71 (7th Cir. 1975), cert. denied, 429 U.S. 818 (1976), which, like this case, involved a scheme to bribe state zoning officials to approve a zoning application, the court of appeals held that the use of interstate banking facilities to transmit bribery funds to the defendant was sufficient to constitute a Travel Act offense. 527 F.2d at 76-79. In three other cases, the Seventh Circuit has premised Travel Act jurisdiction on the interstate movement of checks. *United States* v. *Ranieri*, 670 F.2d 702, 717-718, cert. denied, 459 U.S. 1035 (1982); *United States* v. *Bursten*, 560 F.2d 779, 782-784 (1977); *United States* v. *Rauhoff*, 525 F.2d 1170, 1173-1175 (1975).[5] Similarly, in

---

[3] See, *e.g.*, *United States* v. *Muskovsky*, 863 F.2d 1319, 1327 (7th Cir. 1988); *United States* v. *Smith*, 789 F.2d 196, 204 (3d Cir.), cert. denied, 479 U.S. 1017 (1986); *United States* v. *O'Dell*, 671 F.2d 191, 193 (6th Cir. 1982); *United States* v. *Bagnariol*, 665 F.2d 877, 898 n.16 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982); *United States* v. *Barbieri*, 614 F.2d 715, 718 (10th Cir. 1980); *United States* v. *Hathaway*, 534 F.2d 386, 398 (1st Cir.), cert. denied, 429 U.S. 819 (1976); *United States* v. *Archer*, 486 F.2d 670, 682-683 (2d Cir. 1973).

[4] Pet. App. 3a; *United States* v. *LaFaivre*, 507 F.2d 1288 (4th Cir. 1974), cert. denied, 420 U.S. 1004 (1975); *United States* v. *Pecora*, 693 F.2d 421, 424 (5th Cir. 1982), cert. denied, 462 U.S. 1119 (1983).

[5] In light the Seventh Circuit's repeated rulings that the Travel Act is violated by the use of interstate facilities to deposit checks for pay-

United States v. *Hathaway*, 534 F.2d 386, 397-398, cert. denied, 429 U.S. 819 (1976), the First Circuit held that the use of the mails to forward checks to the defendants in a bribery and extortion scheme fell squarely within the Travel Act. Thus, there is no conflict on the facts of this case.[6]

---

ment to participants in illegal activity, petitioner's reliance (Pet. 15-18) on two earlier Seventh Circuit decisions, *United States* v. *Altobella*, 442 F.2d 310 (1971), and *United States* v. *Isaacs*, 493 F.2d 1124, cert. denied, 417 U.S. 976 (1974), is misplaced. Moreover, as the court explained in *Peskin* (527 F.2d at 77-78), those cases are distinguishable. In *Altobella*, the only tie to an interstate facility occurred when the victim of an extortion scheme gave an out-of-state check for $100 to the defendants, who preferred cash; that connection to interstate facilities was deemed minimal and fortuitous. The connection in *Isaacs* was even more so. There, checks were drawn in Illinois on an Illinois bank to distribute bribery proceeds to the defendants, who deposited the checks in Illinois banks. The court rejected the government's argument that jurisdiction could be premised on the fact that the checks were cleared through the Federal Reserve Bank in St. Louis, Missouri. 493 F.2d at 1146-1149. Here, in contrast, checks were used to supply the fund held by the intermediary who bribed the Board members and to distribute the proceeds among the Board members. The use of the fund held by the intermediary attorney and its subsequent distribution was central to the scheme and cannot be termed "fortuitous". Nor was it fortuitous that the checks moved from the District of Columbia to Virginia and (in the case of Cotton's bribe, which formed the jurisdictional basis for petitioner's conviction) back to the District.

[6] Petitioner also contends (Pet. 18-20) that the court of appeals' decision will upset federal-state relations in the field of law enforcement. Petitioner's argument, however, is just another way of restating his position that the Travel Act requires more than a minimal connection between interstate facilities and the illegal activity. As noted above, however, the use of interstate banking facilities to deposit a check representing payment to a bribed official falls within the Travel Act. Therefore, the decision below does not alter the balance set by Congress in enacting the Travel Act.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
THOMAS E. BOOTH
Attorney

AUGUST 1989

U.S. GOVERNMENT PRINTING OFFICE 1989—241 699/00387